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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 STEVEN DEON TURNER JR.,) Case No. CV 17-0290-PA (JPR)
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13 Petitioner,)
14) ORDER ACCEPTING FINDINGS AND
15 v.) RECOMMENDATIONS OF U.S.
16 WILLIAM SULLIVAN, Warden,)
17)
18 Respondent.)
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29 Pursuant to 28 U.S.C. § 636, the Court has reviewed the
30 Petition, First Amended Petition, records on file, and Report and
31 Recommendation of U.S. Magistrate Judge, which recommends that
32 Petitioner's request for appointment of counsel be denied, the
33 FAP be denied, and this action be dismissed with prejudice. On
34 January 9, 2019, Petitioner filed Objections to the R. & R.

35 The Objections largely reargue the merits of Petitioner's
36 claim that Penal Code section 211 is void for vagueness under
37 Johnson v. United States, 135 S. Ct. 2551, 2561-63 (2015), and
38 that his 2004 conviction for second-degree robbery therefore

1 cannot stand. (See Objs. at 2-3.)¹ He nowhere contests the
2 Magistrate Judge's sound conclusion (see R. & R. at 20-21) that
3 he may not now collaterally attack that conviction through his
4 current challenge to his 2011 convictions for shooting at an
5 occupied motor vehicle and other offenses. Instead, he cites
6 United States v. Dixon, 805 F.3d 1193, 1198 (9th Cir. 2015),
7 which found that section 211 "criminalizes conduct not included
8 in the [Armed Career Criminal Act]'s definition of 'violent
9 felony.'" (See id. (citation omitted).) But as the Magistrate
10 Judge correctly pointed out, he was not sentenced under the ACCA,
11 and in any event section 211 makes abundantly clear what conduct
12 is prohibited and California statutorily defines "any robbery" as
13 a "violent felony." (See R. & R. at 17-19); see also Penal Code
14 §§ 211, 667.5(c)(9). That framework is untouched by Johnson, 135
15 S. Ct. at 2555-56, as the Magistrate Judge discussed in the R.
16 & R. (See R. & R. at 18-19.)² His objection on this ground is

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18 ¹ The Court uses the pagination generated by its Case
19 Management/Electronic Case Filing system.

20 ² The Supreme Court recently held that robbery with force
21 "sufficient to overcome a victim's resistance" is "capable of
22 causing physical injury within the meaning of Johnson" and
23 therefore qualifies as a crime of violence under the ACCA.
24 Stokeling v. United States, 586 U.S. ___, 2019 WL 189343, at *8
25 (U.S. Jan. 15, 2019). The Court further found that Florida's
26 statutory definition of robbery, which requires a taking with "the
27 use of force, violence, assault, or putting in fear," meets this
28 standard. See id. at *9 (quoting Fla. Stat. § 812.13(1)).
Although the Florida statute at issue in Stokeling appears to
require a greater showing of force than Penal Code section 211, as
discussed above Petitioner was not sentenced under the ACCA, and
any challenge to his 2004 robbery conviction is not cognizable
here; moreover, Stokeling cannot serve as clearly established
Supreme Court precedent for purposes of AEDPA because it was
decided long after the last state-court adjudication on the merits

1 therefore without merit.

2 Petitioner further objects that his 2011 conviction under
3 section 246 (which prohibits shooting into an occupied motor
4 vehicle) should be remanded for resentencing because that
5 provision and section "212.5 second degree robbery" are
6 "[r]eally" "void for vagueness" and the "Constitution of
7 California" has called them "Non-Violent." (Objs. at 3.) He has
8 not cited any state constitutional provision saying that,
9 however, and the Court knows of no such definition. The
10 provision he does cite (see id.) provides that a person convicted
11 of a nonviolent felony offense and sentenced to state prison
12 "shall be eligible for parole consideration after completing the
13 full term" for his "primary offense," Cal. Const. art. 1,
14 § 32(a)(1). The FAP did not raise any claim to habeas relief
15 based on denied or delayed parole (see generally FAP at 16-28,
16 30-34), and as noted in the R. & R. (see R. & R. at 16), section
17 246 is statutorily defined as a "serious felony" for purposes of
18 the Three Strikes Law regardless of whether it might also be a
19 violent felony, see Penal Code §§ 667 & 1192.7(c)(33). Thus, the
20 relevance of that constitutional provision to his claims is not
21 readily apparent.

22 Further, Petitioner was not, as he now appears to believe
23 (see Objs. at 3), convicted of violating section 212.5, which
24 makes robbery committed on public transit or of an inhabited
25 home, "floating home," or "trailer coach," or of a person using
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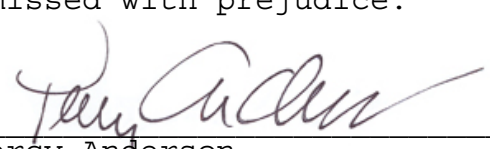
27 of Petitioner's claims. See Greene v. Fisher, 565 U.S. 34, 40
28 (2011).

1 or who has just used an ATM, robbery of the first degree, see
2 Penal Code § 212.5, and it therefore does not appear relevant to
3 the claims of the FAP. This objection is not well taken.

4 Petitioner also objects conclusorily to the Magistrate
5 Judge's finding that he was not entitled to habeas relief on his
6 instructional-error claim; in his view, the trial judge had a
7 "contractual 'duty'" to instruct the jury "of a lesser included
8 offence [sic]." (Objs. at 3.) He cites no case law, much less
9 clearly established Supreme Court precedent, to support that
10 contention (see id.); indeed, he cannot because as the Magistrate
11 Judge discussed, no such clearly established law exists, and in
12 any event the evidence at trial gave no support whatsoever for
13 his desired instruction (see R. & R. at 23-28). Thus, his
14 objection on this ground also fails.

15 Having reviewed de novo those portions of the R. & R. to
16 which Petitioner objects, the Court agrees with and accepts the
17 findings and recommendations of the Magistrate Judge. IT
18 THEREFORE IS ORDERED that Petitioner's request for appointment of
19 counsel be denied and the FAP be dismissed with prejudice.

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21 DATED: January 26, 2019



Percy Anderson
UNITED STATES DISTRICT JUDGE